(21)

No. 92-1384

IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM 1993

BARCLAYS BANK PLC,

Petitioner,

v

FRANCHISE TAX BOARD, AN
AGENCY OF THE STATE OF CALIFORNIA,

Respondent.

ON WRIT OF *CERTIORARI* TO THE COURT OF
APPEAL OF THE STATE OF CALIFORNIA IN
AND FOR THE THIRD APPELLATE DISTRICT

BRIEF OF ORGANIZATION FOR INTERNATIONAL INVESTMENT INC. AND UNION OF INDUSTRIAL AND EMPLOYERS' CONFEDERATIONS OF EUROPE AS *AMICI CURIÆ* IN SUPPORT OF PETITIONER

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INTEREST OF *AMICI CURIÆ*

The Organization for International Investment Inc. ("OFII") is a non-profit corporation the members of which are United States subsidiaries of foreign shareholders.[1] The Union of Industrial and Employer's Confederations of Europe ("UNICE") is recognized as the official representative of European business and industry vis-a-vis the European Union's institutions.[2]

1. Appendix 1 lists OFII members. Neither the petitioner nor any of its subsidiaries and affiliates are members of OFII.
2. Appendix 2 lists UNICE member organizations.

OFII members are domestic corporations operating principally within the United States in manufacturing, wholesale and retail distribution, and performance of services. OFII members export manufactured and processed goods as well as import manufactured articles and raw materials. OFII represents members' interests in matters of federal and State taxation and seeks legislative and judicial solutions to problems affecting economic interests of members. OFII members have a direct interest in the international aspects of the tax issues presented by this case. Similarly to the petitioner, OFII members are treated as unitary with their foreign affiliates and bear an increased and discriminatory tax burden under California law. OFII members are assessed California taxes on foreign income of their foreign parents and other affiliated companies that do no business in California or in the United States. The California method of worldwide unitary combination for taxation creates a substantial impediment to commerce with and investment in the United States by foreign persons including foreign parents and affiliates of OFII members.

The member federations of UNICE are the official representatives of all sectors of business and industry in their respective nations. UNICE comprises thirty-two member federations from twenty-four European nations including all European Union and European Free Trade Association nations. UNICE's permanent secretariat is in Brussels, Belgium. An important objective of UNICE is to promote international commerce and investment by eliminating international double taxation. California's taxation of foreign source income of foreign companies that is excluded from federal taxation is a direct impediment to the free flow of trade and investment between the United States and the nations represented by UNICE's member federations. Such taxation is in contravention of the foreign commerce policy of the United States and its taxation treaties with other nations. UNICE is particularly concerned with the chilling effect the extraterritorial reach of California's worldwide unitary combination for taxation has on foreign direct investment in the United States by UNICE's member components.

SUMMARY STATEMENT

In upholding California's authority to tax income earned by corporations outside the jurisdiction of the United States by apportioning their worldwide income to their U.S. affiliates in contravention of federal and international law and practice adopted by the OECD nations, the California Supreme Court disregarded longstanding precedents of the United States Supreme Court.[3] The decision below effectively declares that only an express Act of Congress can prohibit a State from utilizing any method it chooses to tax international commerce. This decision ignores constraints on State taxation of foreign commerce established by this Court more than twenty years ago. It is irrefutable that "the analysis and holdings of the California Supreme Court are subject to serious question."[4]

California's method of taxing U.S. companies with foreign ownership effectively subjects the non-U.S. profits of those foreign parents and their non-U.S. affiliates to California tax. This has provoked consistent and vigorous protests from the governments and businesses of trading partners of the United States. California's worldwide method also has been consistently opposed by the federal Executive as an intrusion into federal prerogatives in foreign affairs and commerce. California's recent legislation[5] is emphatically *not* a reason to allow the irresponsible decision of the California Supreme Court to stand as precedent. That legislation has no effect on taxes unconstitutionally collected long before the legislation was enacted. The constitutional limit of State power to tax international commerce is as much an issue as ever. California has neither conformed to the federal and international standard nor renounced the *claim of right* to reimpose mandatory unitary taxes

3. E.g. *Japan Line, Ltd. v County of Los Angeles*, 441 U.S. 434 (1979). This Court's concern over foreign reaction to aberrant State actions was expressed as early *Chy Lung v Freeman*, 92 U.S. 275 (1875).

4. Solicitor General's brief *amicus curiæ* for the United States, opposing the grant of *certiorari*, p. 8.

5. SB 671, signed into law on 6 October 1993. Relevant portions of this Act are reproduced as appendix A to the Supplemental Brief of Respondent in Opposition.

on foreign commerce at the whim of its legislature.

State taxation of domestic parent corporations with foreign subsidiaries necessarily rests on a different footing than State taxation of foreign parent corporations with U.S. subsidiaries. To the extent California's tax practices contravene U.S. international tax policy and burden international investment, they invite foreign countermeasures *against businesses in the United States as a whole.* This is what makes California's tax method unconstitutional.

There can be no question of regarding worldwide unitary taxation as an alternative to arm's length separate accounting. The United States and all of its major trading partners observe and implement the arm's length method by treaty and by statute. If that method is to be abandoned, it can only be done by international agreement. As a State of the United States, California is not permitted to enter into or negotiate international agreements but, under the "one voice" principle, must conform to federal practice in international matters.

ARGUMENT

I. THE CALIFORNIA SUPREME COURT'S DECISION IN BARCLAYS BANK IGNORES GUIDELINES FOR TAXATION OF INTERNATIONAL COMMERCE ESTABLISHED BY THE UNITED STATES SUPREME COURT.

The California District Court of Appeal initially decided that the petitioner, Barclays Bank PLC ("Barclays"), was entitled to a refund because application of California's worldwide, combined unitary apportionment method of taxing[6] foreign parent companies' incomes violated the Commerce Clause of the United States Constitution.[7] The California Supreme Court reversed this in an

6. This method will hereafter be referred to as "unitary taxation" or the "unitary tax."

7. See Appendix B to the Petition for a Writ of *Certiorari* in this case for the full text of the initial opinion.

opinion that inverts the United States Supreme Court's Commerce Clause jurisprudence.[8]

Constitutional limits on the power of a State to tax multinational corporations were established in a series of cases beginning with *Japan Line, Ltd. v County of Los Angeles.*[9] That case holds that a State tax on an instrumentality of commerce owned by a *foreign* person is prohibited by the Commerce Clause if it interferes with the ability of the United States to "speak with one voice" in foreign affairs or presents a risk of double taxation. *Container Corp. of America v Franchise Tax Bd.*[10] reaffirmed the *Japan Line* principles while permitting the State to tax *domestic* corporations with foreign subsidiaries on a unitary basis. *Container* explicitly recognized the distinction between taxing a U.S. parent company on its foreign subsidiary's income and taxing a U.S. subsidiary on its foreign parent's income. Your *amici* take no position on the constitutional merits of the companion case of *Colgate Palmolive Co. v Franchise Tax Bd.*, involving a domestic parent company.

This Court reaffirmed the general principles of *Japan Line* and *Container* last term in *Kraft General Foods v Iowa Dep't of Rev. & Finance.*[11] That case dealt with discriminatory treatment of foreign dividends rather than discriminatory treatment of foreign investments. But this language from *Kraft* is equally applicable to the case at bar:

> In *Japan Line, Ltd. v County of Los Angeles* ..., we concluded that the constitutional prohibition against state taxation of foreign commerce is broader than the protection afforded to interstate commerce, ... in part because matters of concern to the entire Nation are implicated .... Like the Import-Export Clause, ... the Foreign Commerce Clause recognizes that discriminatory treatment of foreign comThe

8. Text of this opinion is found in Appendix C to the Petition for a Writ of *Certiorari*.

9. 441 U.S. 434 (1979).

10. 463 U.S. 159 (1983).

11. 505 U.S. ___, 112 S.Ct. 2365 (1992).

> merce may create problems, such as the potential for international retaliation, that concern the Nation as a whole.
> [112 S.Ct. at p. 2370, citations omitted]

The California Supreme Court have discarded these principles based on a distorted reading of the decision of this Court in *Wardair Canada v Florida Dep't of Revenue.*[12] But there is nothing in the *Wardair* opinion suggesting that this Court have abandoned dormant commerce clause analysis or that the principles of *Japan Line* and *Container,* as reaffirmed in *Kraft,* no longer apply. *Wardair* involved a State sales tax levied under an express *federal* statutory exception. The issue was whether that exception had been abrogated by an international convention that this Court found to be inapplicable. The doctrine the California Supreme Court erroneously distill from *Wardair* is that a State may impose any tax it chooses upon foreign commerce until specifically forbidden by Congress. Were this truly the case, then *Japan Line* would be in error; *Container* would have been an exercise in futility; and *Kraft* would have missed the point.

Members of the international business community represented by *amici* believe that the opinion of the California Supreme Court in the instant case conflicts with the decisions of this Court and that the opinion poses a substantial impediment to foreign investment in the United States. Should a significant number of other States choose to follow the California Supreme Court's decision, havoc would be wrought on the international trade of the United States.[13]

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12. 477 U.S. 1 (1986).

13. Several States permit some form of worldwide unitary taxation that does not directly involve income of non-resident foreign companies. North Dakota's statute is virtually identical to California's, but the State has little foreign investment. Alaska applies unitary only to oil and gas production and transportation; Arizona and Indiana exclude foreign entities not conducting business within the State; New York and Tennessee require worldwide combination only if the arm's length method fails to reflect income properly; Montana exempts foreign parent affiliated groups; New Hampshire applies the method only to dividends from foreign affiliates.

II. RECENT CALIFORNIA LEGISLATION DOES NOT ADDRESS THE BARCLAYS BANK ISSUE AND DOES NOT REMEDY THE UNDERLYING PROBLEMS WITH WORLDWIDE UNITARY COMBINATION.

California has recently modified its worldwide unitary tax system as a result of extreme pressure from the Administration and the threat of counter action by foreign governments against U.S. corporations doing business abroad.[14] The United Kingdom's threat of retaliation against U.S. companies probably had the greatest impact[15]. Although the California legislation has deferred implementation of retaliatory measures by the U.K., it clearly has not fully satisfied the concerns of foreign governments.[16] The reasons for this are quite apparent: (1) The legislation takes effect prospectively from 1994 and does not address the previous twenty years of taxes wrongly collected; and (2) California has not renounced its claim of right to impose worldwide unitary taxation on foreign parent corporations. The legislation retains worldwide unitary as the norm, and only conditionally permits corporations to "elect" exclusion of *most*[17] foreign source in come of affiliated foreign corporations (generally referred to as a "water's edge election").

This is not the appropriate case to analyze the specific provisions of SB 671. By its own terms, it has no effect on the amounts or the years at issue before this Court. It was a pragmatic response to a sense of international outrage that did not do away with the need for this Court to deal with the important legal issues

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14. SB 671, *supra,* n. 5.

15. See Appendix 3; *cf.* Appendix 6.

16. See Appendices 3, 4, and 5.

17. There are serious unresolved issues in the new law of what actually constitutes "water's edge" income of a domestic taxpayer. Formulary apportionment still applies to those foreign entities whose U.S. apportionment factors equal or exceed 20% of the total. SB 671 Section 22, amending Cal. Rev. & Tax Code § 25110(a)(3). It is also unclear to what extent U.S. source income of an affiliated foreign entity may be attributed to a California taxpayer under the State Board of Equalization's nexus rules.

at stake in the instant case. The only significant point is that according to the decision of the California Supreme Court, the California Legislature may reinstate mandatory, worldwide, unitary taxation at any time, without constitutional restraint. It has taken more than ten years for this case to reach this Court; were California free to reinstate mandatory worldwide unitary combination after this case is decided, international outrage would be inevitable, the integrity and authority of the United States as one nation thrown into doubt, and U.S. trade and investments abroad exposed to the very real risk of damaging counter-measures.

Your *amici* vigorously disagree with the statement of the Solicitor General in the *amicus* brief for the United States opposing *certiorari* (p. 10) that "[f]urther review by this Court is not needed to achieve, and could potentially destabilize, the accommodation of state, national and international interests that has been reached on this issue." No such accommodation has been reached on this issue, at least internationally, as shown by the official statements of foreign governments.[18] These statements only underscore the need for this Court to provide firm guidelines on the extent to which federal and international tax policy supervenes State tax considerations in matters affecting foreign commerce. The international business community prays this Court not to allow the voice of the United States heard abroad to be reduced to a babble of diverse and conflicting State policies.

III. STATE TAXATION OF FOREIGN PARENT COMPANIES RESTS ON A DIFFERENT FOOTING THAN STATE TAXATION OF DOMESTIC PARENT COMPANIES. STATE TAXATION OF FOREIGN SOURCE INCOME OF FOREIGN PARENT COMPANIES IS CLEARLY UNCONSTITUTIONAL.

18. Statement of Rt. Hon. Kenneth Clarke, Chancellor of the Exchequer, Sep. 15, 1993, Appendix 3; Demarche of the European Community, Sep. 24, 1993, Appendix 4; and Demarche of the 20 countries, Oct. 14, 1993, Appendix 5.

Your *amici*, organizations that fairly represent the spectrum of major foreign investors in the United States, are very concerned with both double taxation and discriminatory treatment of those investments by application of California's unitary tax method. California presumes[19] that in-State activities benefit all commonly owned businesses elsewhere irrespective of the forms of organization or lack of economic nexus amongst those businesses. Whatever validity this presumption may have in the context of a domestic parent company, which is the ultimate recipient of group earnings, it has none with respect to a parent company located in a foreign nation. The price of investment in California should not include foreign investor compliance with California record-keeping and tax accounting principles for income from sources having no connection with California. It is this intrusion into business affairs of foreign persons that has led to so much international protest. No trading partner of the U.S. seeks to impose a comparable requirement on U.S. companies investing abroad.[20]

California's inclusion of foreign parent income in the tax base creates an "enhanced risk of multiple taxation."[21] The principal reason for this risk is the "absence of an authoritative tribunal capable of ensuring that the aggregation of taxes is computed on no more than one full value ...."[22] A foreign parent whose income is attributed to its U.S. subsidiary does not even have standing in

19. "A taxpayer is engaged in a unitary business ... when its activities within the state contribute to or are dependent upon its activities without the state." 18 Cal. Admin. Regs. § 25137-6(a)(1).

20. The elements of "unitary" in California jurisprudence are elusive. Cf. *Tenneco West, Inc. v Franchise Tax Bd.*, 91 C.D.O.S. 8183 (Cal. App. 4th Dist. 1991) with *Mole Richardson Co. v Franchise Tax Bd.*, 220 Cal. App. 3d 889, 269 Cal. Rptr. 662 (1990). The respondent Franchise Tax Board attempted for some years to develop "diverse business regulations" to define what is unitary and what is not. That attempt has been altogether adandoned. A case by case approach continues to be used. More recently, the Franchise Tax Board has taken the position that share ownership alone should be sufficient. This is similar to the grounds unsuccessfully argued by *New Jersy in Allied-Signal, Inc. v Director, Div. of Taxation* ___ U.S. ___, 112 S.Ct. 2251 (1992).

21. *Container Corp. v Franchise Tax Bd.*, 463 U.S. at p. 185; *Japan Line v County of Los Angeles*, 441 U.S. at pp. 447-48.

22. *Japan Line*, 441 U.S. at pp. 447-448; quoted in *Container* at 463 U.S. pp. 185-86.

U.S. courts to challenge the income attribution.[23] The petitioner in the instant case was only able to achieve standing by virtue of itself doing business in California. Most foreign parent companies are denied even that remedy. It is the *potential* as well as the actuality of double taxation and burdensome compliance costs that create an unreasonable risk for the foreign parent company.[24]

Even more distressing is California's refusal to recognize the primary right of the foreign parent's nation of domicile to tax income sourced in that domicile. California provides no foreign tax credit on previously taxed foreign income. The respondent, indeed, declares unequivocally that income from foreign sources apportioned to California by the unitary tax formula *is really California source income.*[25] California thereby constrains foreign jurisdictions to adopt similar taxing methods in order to protect their own nationals from double taxation of income that, under accepted international practice, is sourced outside of California.

This Court recognized the distinction between State taxation of international commerce involving a domestic parent and taxation of a foreign parent.[26] While there may be valid reasons for revisiting the *Container* decision,[27] it is not necessary to disturb that opinion in order to reach an appropriate result in the instant case. This Court is urged to adopt the position heretofore taken by the United States Government in numerous briefs filed before the California courts in this case that unitary taxation of foreign parent companies is clearly unconstitutional.

23. *Franchise Tax Bd. v Alcan Aluminium, Ltd.*, 493 U.S. 331 (1990). While the foreign parent's and its non-U.S. subsidiaries' income may be *taxed* in California to the domestic subsidiary, California does not deem the foreign parent to be a *taxpayer*, hence has no standing to seek redress in California courts. Cal. Rev. & Tax Code § 23037 and § 23102. *Cf. EMI Ltd. v Bennett*, 738 F.2d 994 (9th Cir.), *cert. denied* 469 U.S. 1073 (1984).

24. The respondent's regulations for "Combined Reports Including Foreign Country Operations," Cal. Admin. Code § 25137-6, are so complex as to be virtually unadministrable. See testimony of respondent's own witness, Professor Shank, TR. pp. 1984 — 2038, especially pp. 2014—2017. In lieu of data and records normally not maintained by foreign companies, the Franchise Tax Board is empowered to accept "reasonable approximations." The respondent, however, is the sole arbiter of "reasonable."

25. A paper was presented in May, 1991, to the Third Annual Washington D.C. Liaison between government tax representatives and the State Bar of California, entitled "Problems with Federal Sourcing of State Franchise Taxes under the 861 Regulations" by Eric J. Cofill, Senior Tax Counsel to the respondent. 1 *California Tax Lawyer* No. 3, pp. 24-26 (Fall 1991). This paper complains of the federal government's insistence that California taxes on income apportioned from foreign sources are taxes on foreign source, not California source income. The paper suggested this was because "[t]he Administration's opposition to the states' use of the unitary method is well known, and may also account for the position taken in the the regulations."

IV. THE MERITS OF UNITARY TAXATION VERSUS SEPARATE ACCOUNTING HAVE NO BEARING ON THE ISSUES IN THIS CASE. SEPARATE ACCOUNTING HAS BEEN THE ESTABLISHED FEDERAL AND INTERNATIONAL STANDARD FOR OVER FORTY YEARS.

The Multistate Tax Commission filed an extensive *amicus* brief with the California Supreme Court in 1991 arguing that the separate accounting system of international taxation, generally referred to as the "arm's length method," utilized by the federal government and its foreign trading partners, is greatly inferior to the unitary method. It is anticipated that a similar argument will be made by the Commission in a brief to be filed with this Court supporting the respondent.

The Commission were established by the Multistate Tax Compact to assist participating States employing the unitary method to tax interstate transactions.[28] The Commission provide audit assistance and proposes model regulations and model statutes for this purpose. Their interest in preserving and improving the use of unitary taxation in *interstate* commerce is appropriate and understandable. What is neither appropriate nor understandable is the Commission's apparent wish to expand the unitary method to *international* commerce where its use conflicts absolutely with established federal and international practice.

26. *Container Corp., supra,* n. 10.

27. See *Container Corp.*, 463 U.S. at pp. 197 — 205 (Powell, J., dissenting).

28. California is a member of the Compact. Cal. Rev. & Tax Code § 38001 *et seq.*

The merits of international use of unitary versus arm's length tax accounting are not justiciable. What is before this Court is whether an individual State may extend its tax base to encompass non-resident foreign persons by a method that is utterly incompatible with United States policy and international agreement. The choice has long since been made by the U.S. Congress and the U.S. Treasury that arm's length separate accounting will be employed in international taxation. The Solicitor General's brief filed in this case, while opposing the grant of *certiorari*, recognized that "[t]he method employed by the United States is known as the 'separate accounting' or 'arm's length' method" and that "[t]he separate accounting method of taxation is employed in the Internal Revenue Code and in the many bilateral tax treaties to which the United States is a party." The Solicitor General further notes that "[t]he separate accounting method is also employed by most other nations for both domestic and international purposes."[29]

The basic reason the unitary method can be applied within the United States to interstate transactions is that the apportionable income base is already established and agreed: consolidated U.S. source income as reported to the federal government. Worldwide unitary, conversely, translates all income, from U.S. and foreign sources, into the currency of the foreign parent, then re-translates that parent company's income into U.S. dollars. Income sourcing rules are ignored because the only income base that can be utilized is that shown in the parent company's annual report consolidating all sources. There is no opportunity for the domestic subsidiary taxpayer to demonstrate that its own operations had no connection with the parent's foreign source income.

A principal defect of the unitary system is the lack of agreement on a standard formula.[30] This is amply illustrated by the

29. Brief for the United States as *amicus curiæ* in Support Of Opposition, p. 2. Treasury regulations, Regs. § 1.482-1T(b)(1), state, "In determining the true taxable income of a controlled taxpayer, the standard to be applied in every case is that of a taxpayer dealing at arm's length with an uncontrolled taxpayer."

30. Apportionment formulas attribute the highest profit to the jurisdiction having the highest factor values. California, a wealthy jurisdiction, uses its high cost standards to skew the formula in its favor. This is totally unacceptable in a global context.

simultaneous passage with SB 671 in California of SB 1176, which instantly changed California's historic three-factor formula by double-weighting the sales factor. This change is clearly designed to shift the incidence of California's tax burden to business groups which have low payroll and property factors but a high volume of sales in California.[31] One can hardly imagine the chaos in international trade were foreign nation to use the unitary method and each devised its own formula. Labor intensive nations might triple-weight numbers of workers employed. Capital intensive nations would surely favor the property factor.

Unitary taxation could not be instituted worldwide without prior agreement on basic principles: the definition of a unitary versus a diverse business; the apportionment formula to be used; treatment of intellectual property rights and transfers; and a standard method for currency translation, to name only the obvious. The arm's length, separate accounting method was conceived to regulate fiscal jurisdiction and prevent double taxation. This method has the advantage of nearly universal agreement on basic principles for more than thirty years; the endorsement of the federal government in the Internal Revenue Code and regulations; and a treaty network that provides a forum for resolving disputes in the form of competent authority proceedings. California's recent attempts to force recognition of its own unique method has produced continuous litigation, protests from foreign as well as the U.S. government, and finally a serious threat of foreign retaliation.

Your *amici* conclude that arguments concerning the supposed advantage of worldwide unitary taxation over the arm's length, separate accounting method have no bearing on the issues in this case. The unitary method as currently practiced by California cannot be reconciled with international or federal practice and its use by a State should be constitutionally restricted to those applications heretofore approved by this Court.

31. This change likely exacerbates interference with foreign commerce since foreign-based affiliated groups are more likely to have larger property investments in research facilities and manufacturing sites as well as higher payroll costs in the domicile of the foreign parent.

CONCLUSION

For the reasons stated, *amici curiæ*, Organization For International Investment and Union of Industrial and Employers' Organizations of Europe urge this Court to reverse the decision below and reinstate the original decision of the California 3rd District Court of Appeal prior to reversal by the California Supreme Court.

Respectfully submitted,

James Merle Carter

Attorney for
Organization for International Investment Inc.
Union of Industrial and Employers' Confederations of Europe

Of Counsel:
Harris, Carter & Mahota

15 December 1993

APPENDICES

APPENDIX 1-1

MEMBER CORPORATIONS OF OFII

AKZO AMERICA, INC.

ALCAN ALUMINUM CORPORATION

ALCATEL USA CORPORATION

ASEA BROWN BOVERI, INC.

BASF CORPORATION

BATUS INC.

BET INC.

BP AMERICA CORPORATION

BTR, INC.

BUMBLE BEE SEAFOODS, INC.

BUNGE CORPORATION

CENTRAL SOYA COMPANY, INC.

CIBA-GEIGY CORPORATION

ELF AQUITAINE, INC.

FINA OIL & CHEMICAL CO.

FIREMAN'S FUND INSURANCE COMPANY

GLAXO INC.

GRAND METROPOLITAN INCORPORATED

GUINNESS AMERICA, INC.

HANSON INDUSTRIES

HITACHI, LTD.

HOECHST CELANESE CORPORATION

HOFFMAN-LA ROCHE, INC.

CI AMERICAS INC.

INSTORIA, INC.

KLOCKNER NAMASCO CORPORATION

LVMH MOET HENNESSY LOUIS VUITTON INC.

MATSUSHITA ELECTRIC CORPORATION OF AMERICA

APPENDIX 1-2

MINORCO (USA) INC.
NEC USA, INC.
NESTLÉ USA, INC.
PEARSON INC.
PECHNINEY CORPORATION
PHILIPS ELECTRONICS NORTH AMERICA CORPORATION
PILKINGTON HOLDINGS, INC.
RANK AMERICA, INC.
REED PUBLISHING (USA) INC.
RHONE-POULENC
ROLEX WATCH, U.S.A., INC.
ROLLS-ROYCE INC.
RTZ AMERICA
SANDOZ CORPORATION
SCHINDLER ELEVATOR CORPORATION
SCHINDLER ELEVATOR CORPORATION
S.G. WARBURG & CO. INC.
SIEMENS CORPORATION
SKF USA, INC.
SMITHKLINE BEECHAM
SONY CORPORATION OF AMERICA
SOUTHLAND CORPORATION
TETRA LAVAL
THORN EMI INC.
TOYOTA MOTOR SALES, U.S.A., INC.
UNILEVER UNITED STATES, INC.
ZURICH INSURANCE CO.

APPENDIX 2-1

MEMBER FEDERATIONS OF UNICE

VEREINIGUNG OSTERREICHISCHER INDUSTRIELLER - VOI

FEDERATION DES ENTREPRISES DE BELGIQUE - FEB

UNION CENTRALE DES ASSOCIATIONS PATRONALES SUISSES - ZVSAO

UNION SUISSE DU COMMERCE ET DE L'INDUSTRIE - VORORT

EMPLOYERS & INDUSTRIALISTS FEDERATION CYPRUS - OEB

BUNDESVEREINIGUNG DER DEUTSCHEN ARBEITGEBERVERBANDE - BDA

BUNDESVERBAND DER DEUTSCHEN INDUSTRIE - BDI

DANSK INDUSTRI - DI

DANISH EMPLOYERS' CONFEDERATION - DA

CONFEDERATION DES EMPLOYEURS ESPAGNOLS - CEOE

CONSEIL NATIONAL DU PATRONAT FRANÇAIS - CNPF

CONFEDERATION OF FINNISH INDUSTRY AND EMPLOYERS - TT

CONFEDERATION OF BRITISH INDUSTRY - CBI

FEDERATION DES INDUSTRIES GRECQUES - FIG

CONFEDERAZIONE GENERALE DELL'INDUSTRIA ITALIANA CONFINDUSTRIA

IRISH BUSINESS AND EMPLOYERS CONFEDERATION - IBEC

FEDERATION OF ICELANDIC INDUSTRIES - FII

CONFEDERATION OF ICELANDIC EMPLOYERS - CIE

FEDERATION DES INDUSTRIELS LUXEMBOURGEOIS - FEDIL

MALTA FEDERATION OF INDUSTRY - MFOI

APPENDIX 2-2

CONFEDERATION OF NORWEGIAN BUSINESS AND INDUSTRY - NHO

VERBOND VAN NEDERLANDSE ONDERNEMINGEN - VNO

NEDERLANDS CHRISTELIJK WERKGEVERSVERBOND - NCW

ASSOCIAÇÃO INDUSTRIAL PORTUGUESA - AIP

CONFEDERAÇÃO DA INDUSTRIA PORTUGUESA - CIP

ASSOCIAZIONE NAZIONALE DELL'INDUSTRIA SAMMARINESE - ANIS

FEDERATION OF SWEDISH INDUSTRIES - SI

SWEDISH EMPLOYERS' CONFEDERATION - SAF

TURKISH CONFEDERATION OF EMPLOYERS ASSOCIATION - TISK

TURKISH INDUSTRIALISTS' AND BUSINESSMEN'S ASSOCIATION - TUSIAD

ZVAZ PRIEMYSLU SLOVENSKEJ REPUBLIKY

SVAZ PRUMYSLU CESKE REPUBLIKY

APPENDIX 3

September 15, 1993, Statement of the Chancellor of the Exchequer, Rt. Hon. Kenneth Clarke, Q.C., M.P.

I am greatly encouraged to learn that California has passed legislation to modify its unitary tax law. This development is a vindication of the Government's decision to set a definite time limit for the implementation of retaliatory measures. But for the Government's action it is clear that there would have been no progress in California. The approach that California has now adopted has been designed to bring to an end the problem of unitary tax for UK owned companies in California. However, given the defects that remain in the law, it will be important to ensure that the spirit of the new approach is followed in the detailed regulations and in the practical application of the law. The UK will therefore defer retaliatory action and will retaliate only if it is found that the legislation is being applied in a way which exposes UK owned companies to damage from taxation that is inconsistent with the arm's length principle. I am informing Secretary Bentsen accordingly.

While the legislation in California is a significant step forward, on its own it does not provide a complete solution to the unitary tax problem. For a complete solution it will be necessary to have the internationally accepted arm's length principle endorsed, on a permanent basis, as the only valid method of taxing foreign companies in any State. Success for the Barclays' case in the Supreme Court would achieve this. The Government will continue strongly to support Barclays' case. I hope it will succeed. If it does not, the UK will have to retain its retaliatory powers in reserve as a barrier against the possibility that States might damage UK owned companies by the imposition of unitary taxation at some time in the future.

APPENDIX 4-1

Demarche on Unitary Taxation, September 24, 1993, from the Embassy of Belgium, Presidency of the European Community, on behalf of the Member States of the European Community, and from the Delegation of the Commission of the European Communities.

EMBASSY OF BELGIUM
WASHINGTON, D.C.

The Honorable
Warren Christopher
Secretary of State
Washington, D.C. 20520

Dear Mr. Secretary,

We have the honor to convey to you the attached note on unitary taxation on behalf of the Governments of the Member States of the European Community and the Commission of the European Communities.

We avail ourselves of this opportunity to renew to you the assurances of our highest consideration.

s/ Juan Cassiers Ambassador of Belgium EC-Presidency	s/ Andreas van Agt Ambassador of the Delegation of the Commission of the European Communities

APPENDIX 4-2

UNITARY TAXATION

1. The Member States of the European Community and the European Commission have the honour to refer to their note of 26 March 1993 in which they expressed their strong opposition to worldwide unitary taxation and urged the United States Government to support the Barclays petition for *certiorari* to the United States Supreme Court. The Member States, together with eight other major trading partners of the United States, subsequently supported the Barclays Petition in an amicus curiæ brief dated 22 April 1993.

2. The Member States and the European Commission note that the State of California has since passed legislation to modify its unitary tax law. While this legislation is an improvement, the Member States and the European Commission do not consider that the unitary tax problem is solved. Worldwide unitary taxation, which is contrary to the internationally agreed arm's length principle, is still the basis of the tax system in California. A complete solution will require the arm's length principle to be established as the only legitimate basis of taxing foreign companies in any state.

3. The Member States and the European Commission therefore continue strongly to urge the United States Government to support the Barclays petition for *certiorari* to the United States Supreme Court.

APPENDIX 5-1

Demarche on Unitary Taxation, October 14, 1993, from the British Embassy on behalf of the Member States of the European Community and the governments of Australia, Austria, Canada, Finland, Japan, Norway, Switzerland and Sweden.

BRITISH EMBASSY
WASHINGTON, D.C.

The Honorable
Warren M. Christopher
Secretary of State
Department of State
7th Floor
Main State Department Building
2001 C Street, N.W.
Washington, D.C. 20520

Dear Mr. Secretary,

With the agreement of the other countries concerned, I have been asked to convey to you the attached note on unitary taxation on behalf of the governments of the member states of the European Community, and of Austria, Australia, Canada, Finland, Japan, Norway, Sweden and Switzerland.

Yours sincerely,

s/ Robin Renwick

APPENDIX 5-2

UNITARY TAXATION

The 12 Member States of the European Communities: Belgium, Denmark, France, Federal Republic of Germany, Greece, Ireland, Italy, Luxembourg, the Netherlands, Portugal, Spain and United Kingdom; and the governments of Australia, Austria, Canada, Finland, Japan, Norway, Sweden and Switzerland ("the 20 countries") have the honour to refer to their brief for the Supreme Court of the United States in the case Barclays Bank plc v. Franchise Tax Board, dated 22 April 1993.

The countries concerned note that, since that date, the State of California has passed legislation to modify its unitary tax law. While this legislation is an improvement, the countries concerned do not consider that the unitary tax problem is finally resolved. Worldwide unitary taxation is contrary to the internationally agreed arm's length principle embodied in the bilateral tax treaties of the United States and disruptive of international economic relations. A complete solution would require the arm's length principle to be established as the only legitimate basis of taxing foreign companies in any state.

The 20 countries regret therefore that, in his brief filed on 7 October 1993, the Solicitor General of the United States does not support the Barclays petition for a writ of *certiorari*.

APPENDIX 6-1

June 30, 1993, Resolution of the Finance Committee of the German Bundestag concerning unitary taxation in the State of California.

The Finance Committee of the German Bundestag has today discussed the problem of unitary taxation as applied in the State of California to the cross-border apportionment of profits between associated enterprises.

The Finance Committee notes that this method of taxation used by the State of California is based on a flat-rate allocation of profits that is inconsistent with the internationally accepted arm's-length principle, that such allocation of profits can result in substantial double taxation and that it imposes disproportionate burdens on enterprises in discharging their tax filing obligations. In the opinion of the Committee, a "water's-edge" rule under which enterprises operating on an international basis can gain exemption from worldwide unitary taxation of their income only on payment of a large fee is also in conflict with the principles of taxation as agreed in the German-American Convention for the Avoidance of Double Taxation.

The Finance Committee notes with regret the departure of the new U.S. administration from the course followed by former U.S. administrations for more than 20 years. The rejection of unitary taxation has always been and still is both a reflection of mutually agreed positions and a necessary means of ensuring, among other things, that economic relations between the United States of America and the Federal Republic of Germany continue to function smoothly and without disruption.

The Finance Committee calls upon the new U.S. administration to return to the common approach adopted by all other OECD

APPENDIX 6-2

countries and to urge the State of California to relinquish, in the interest of avoiding disruptions of international trade, the system of unitary taxation that is rejected by all other industrialized nations.

The Finance Committee requests the German government to take immediate steps to consider the application of retaliatory measures should it prove impossible to achieve a satisfactory solution to the problem of unitary taxation within a reasonable period of time. In making this request, the Finance Committee proceeds on the assumption that it will be possible to reach a satisfactory solution by the end of 1993.